

The Bureau relies on T1, pp.22-23. The Bureau is wrong. Mr. Turro testified that he maintained this antenna in the basement of the Mediterranean Towers during the Spring of 1995. He did not testify to 1996 or state "between April 1995, and sometime in 1996." Moreover, Mr. Loginow had no "understanding" about antennas to receive the Pomona translator. Mr. Loginow merely assumed that all antennas were on the roof when he tested on May 15, 1995. He did not go out on the roof to look for antennas (he tried to but the door to the roof was locked), he never inspected the rest of the building for receive antennas, and when he inspected on August 2, 1995, Mr. Loginow declined Mr. Turro's invitation to examine the receive antennas not located on the roof.⁵

The Bureau contends in its Proposed Finding 39 that Mr. Loginow:

...testified that if there was equipment in the basement of the Mediterranean Towers sensitive enough to pick-up Pomona's one-watt signal from 22 miles away, that equipment would be likely to receive the ½ watt dead-carrier signal being generated on the same frequency as many as 26 floors above it. Tr. 370, 378, 549.

Mr. Loginow actually testified:

According to my experience, if a receiving system was sensitive enough to be located in the basement, below ground level, and receiving a one watt signal 22 miles away, it would receive the signal generator 26 floors up. That is certainly close enough. (TR 370)

The Bureau's reliance on this testimony is faulty for several reasons. The issue is whether the receive antenna in the basement could receive the signal generated by Mr. Loginow from the roof enclosure and whether that generated signal then would be strong enough to override the Pomona translator being received there ordinarily. Mr. Loginow never tested

⁵The record concerning Mr. Loginow's August 2, 1995 decision not to inspect the receive antennas which were located in the building but not on the roof is described in the section concerning candor and misrepresentation, infra.

whether his signal generator at roof level of the Mediterranean Towers would be able to override an antenna in the basement and he never tested the sensitivity of any antenna in the basement. (TR 370) Nor did Mr. Loginow test the signal strength of the Pomona translator in the basement of the Mediterranean Towers. Mr. Loginow never inspected all of the floors of the building and therefore had no knowledge of the basement. (TR 379-380) The Bureau agrees that Mr. Loginow never inspected the basement. (Bureau Proposed Finding 42)

Mr. Loginow had no basis to know if the basement was below ground level, as he contended. Neither Mr. Loginow nor the Bureau established in the record that the Pomona translator signal was "one watt" as Mr. Loginow testified.⁶ The only evidence in the record is that the Pomona translator places a very strong signal into Fort Lee, *i.e.* Mr. La Follette testified that he measured the signal strength of the Pomona translator in Fort Lee at 224 microvolts, a noise free, high quality signal (TR 666-667), one which he considered to be "a very good quality signal." (TR 706; see also T7, p. 4) Therefore, Mr. Loginow's testimony relied upon by the Bureau here is unsupported, lacks foundation and contradicts testimony from a technical witness of the Bureau and Universal.

The Bureau also attempts to refute Mr. Hurst's testimony about the actual tests performed at the Mediterranean Towers, which demonstrated that a 5 watt signal on the Pomona translator frequency, ten times stronger than Mr. Loginow's signal, did not pass through the building and override a receiver. (T35, pp. 3-4) In its Proposed Finding 40, the Bureau contends that: "There is, however, no evidence that Hurst tested whether his signal generator on the roof could not

⁶The Commission's records indicate that the effective radiated power of the Pomona translator is 3 watts. See File No. BLFT-900112TC

block reception of Pomona's over-the-air signal as received in the basement as claimed by Turro."

The Bureau is wrong. Mr. Hurst testified:

Since we were located at the location where an alternate antenna system for Pomona had been installed for a period of time, including the period on or about May 15, 1995, and we were unable with a 5 watt output to cause interference to the receipt of Pomona with its antenna located on the roof, in my opinion someone located on or near the roof of the building would not be able to cause interference to the reception of Pomona with a 0.5 watt signal (which I understand Mr. Loginow testified he employed) when the receiving antenna was located in the basement. (T35, pp. 3-4)

The Bureau misapprehends the record. It is uncontested that Mr. Hurst is an expert consulting engineer with more than 35 years of experience and seniority. His testing combined with his expert testimony *is the evidence* that Mr. Loginow's signal from the roof enclosure would not have affected an antenna in the basement. Mr. Hurst's testimony on this point is unchallenged. The Bureau neither cross-examined him substantively on this point, nor did it offer rebuttal expert testimony, even though Jules Cohen, Wilson La Follette and two Bureau technical employees obviously were available to the Bureau and Universal during the hearing. Therefore, the actual evidence arrayed against Mr. Loginow's unsubstantiated and contradictory speculation clearly establishes that his signal generator would not have affected the Pomona translator receive antenna in the basement of the Mediterranean Towers.

The Bureau and Universal make an attempt to mischaracterize the evidence about the Pomona translator signal that may be received at the antenna location in the basement of the Mediterranean Towers. It appears that the Bureau and Universal have chosen to characterize that area as a "hot spot" in an effort to discredit indirectly the evidence concerning reception of the Monticello station on the roof, because it was unable to discredit that evidence directly.

However, the Bureau and Universal are wrong to characterize the area in the basement as a "hot spot" (Bureau Proposed Finding 37, note 3; Universal Proposed Finding 26) and it is mistaken to contend that Mr. Hurst did not personally observe the "equipment in the basement of the Mediterranean Towers." Both representations fail to take account of the actual record.

The term "hot spot" is something of a misnomer in reference to the reception of the Pomona translator in the Mediterranean Towers basement. Mr. Hurst testified that the Pomona translator could be received throughout that portion of the basement (TR 1914) and that he was able to move the radio around in that general area of the basement with reception of the Pomona translator staying the same. (TR 1893) Mr. Turro testified that the Pomona translator reception area in the basement was far broader than the hot spot on the roof, more in the nature of a "six foot wall" rather than a spot (TR 1989-1990) or perhaps a ten foot area. (TR 1992-1993) Mr. Turro never referred to the area in the basement as a "hot spot." (TR 1992) In addition, there was ample evidence that the Pomona translator generally places a strong signal into Fort Lee. This was confirmed by Mr. La Follette, the Bureau and Universal's own witness (TR 666-667; 706), and by Mr. Hidle. (T7, p. 4)

As for the receive antenna, Mr. Hurst personally observed an antenna in the Mediterranean Towers basement covered in dust and apparently abandoned, which was shown in the video tape associated with T2. (TR 1898-1899; 1994) Therefore, it is incorrect for the Bureau to contend flatly that Mr. Hurst never observed the basement receive antenna.

In addition, Mr. Hurst's testimony makes good sense. As noted above, he tested the passage of radio waves through the exact same building, and at the exact same frequency, testified about by Mr. Loginow. Assuming that the laws of physics did not change between May

1995 and October 1997, the passage of such radio transmissions would not have been materially different. Therefore, Mr. Hurst's test results and testimony are the only credible evidence of record.

D The parties agree that Mr. Loginow proved on April 14, 1995 that the Fort Lee translator received its programming off the air and not via WMG-499

In its Proposed Finding 30, the Bureau agrees that the record shows that on April 14, 1995, based upon his own testing, Mr. Loginow determined that the Fort Lee translator was receiving its programming off the air from the Pomona translator, which in turn was receiving its programming off the air from the Monticello station, all while WMG-499 was active. In short, all parties agree that Mr. Loginow determined on April 14, 1995, that WMG-499 was turned on but not supplying programming to the Fort Lee translator. That programming was being received off the air, consistent in all respects with the Commission's Rules and with Mr. Turro's testimony.

Nonetheless, the Bureau apparently attempts to undermine the credibility of its own field engineer by suggesting that:

The results of this testing were not unexpected by Loginow, as he disclosed his plans to monitor the frequencies to Turro and Eugene Blabey...the previous day. Consistent with sound investigative techniques, the results of that testing were to be used as a frame of reference for later unannounced monitoring to determine any variations. MMB Ex. 17, p. 267; MMB Ex. 18, p. 333. (Bureau Proposed Finding 30)

The citations to MMB17 and MMB18 (which are identical) do not support the proposition. Mr. Loginow actually stated that: "As I got the expected results from the transmitter shut-off, I conducted this test once." (*Ibid.*) Mr. Loginow clearly meant that he expected to find compliance with the Commission's Rules, and upon finding compliance immediately, felt no

need to repeat the test. (It is also possible that he did not want to continue to interrupt the on air operations of the Monticello station, the Pomona translator and the Fort Lee translator.)

In the subsequent paragraph, Mr. Loginow stated: "The fact that this test was disclosed to Blabey and Turro before it was conducted is consistent with sound investigative techniques employed by the field staff." (Ibid.) By mixing the sense of these paragraphs, the Bureau apparently wants to give the impression that Mr. Loginow and the entire FCC "field staff" consider it "sound investigative technique" to affirmatively warn suspected miscreants and liars about imminent testing so that they may mislead the field staff with phoney results, which would then provide "a frame of reference" for future investigations.

Obviously, the only rational understanding of Mr. Loginow's testimony was that he determined that the stations were in compliance with the Commission's Rules on April 14, 1995, and whatever discussions he had with Mr. Blabey the previous day did not influence the test results (*i.e.* that arranging with Mr. Blabey to test the Monticello station transmitter by turning it off and on was consistent with sound investigative techniques). It is undisputed that at the time of Mr. Loginow's April 1995 inspections, the facilities of the Monticello station were operating at reduced power due to a lightning strike (Turro PF 104-105) and therefore Mr. Loginow may have sought to avoid additional stress to the transmitter by not turning it off and on unnecessarily.

Moreover, the Bureau's interpretation (Bureau Proposed Finding 30) requires a finding that Mr. Loginow lacked candor during the hearing, a finding we do not support. On cross-examination, Mr. Loginow testified that on April 14, 1995 he determined "to a high degree of assurity" that the Fort Lee translator was receiving the signal of the Pomona translator which, in

turn, was receiving the signal of the Monticello station, and that the Fort Lee and Pomona translators "passed the test." (TR 345-346; Turro PF 113-114) The Bureau's interpretation of events requires a finding that Mr. Loginow performed his investigations on April 14, 1995, reported his "determinations" contemporaneously to the Commission (MMB16, pp. 253-255), testified that the stations "passed the test," and testified to his determinations' "high degree of assurity" at the hearing, while all along believing, but not telling anyone, that the results were rigged by Mr. Blabey or others based upon Mr. Loginow's tip the day before. This Bureau attempt to undermine its own witness is untenable.

Accordingly, the Presiding Judge should find that based upon its own actual testing, the Commission determined that on April 14, 1995, WMG-499, and the FM station and translator stations subject to this proceeding were operating in compliance with the Commission Rules at issue in the HDO. The record supports such a finding conclusively, and there is no credible opposition to it from the parties.

E The full record requires a finding that WMG-499 was used lawfully

Although substantially unaddressed (and therefore unrefuted) by the Bureau, the record as a whole supports by a clear preponderance that Mr. Turro operated WMG-499 in compliance with the Commission's Rules. These matters are explained in full in Mr. Turro's Proposed Findings, but in summary are the following.

As described in the previous section, Mr. Loginow actually determined that WMG-499 and the subject stations were in compliance with the Commission's Rules on April 14, 1995. (Turro PF 112-114)

Mr. Loginow thought that WMG-499 was being used illegally on May 15, 1995, but his

understanding was based upon now well described misapprehensions, most of the proof of which is unchallenged in the record. (Turro PF 264-284)

Although the Bureau ignores it in its Proposed Findings, on August 2, 1995, Mr. Loginow conducted his complete and only inspections of the Fort Lee and Pomona translators and tested how they received Jukebox Radio programming. In those investigations, Mr. Loginow determined conclusively that the translators were receiving programming by off the air reception, and that there were no other means of signal reception available. (Turro PF 118-134) Mr. Loginow established on that day that the translators were able to retransmit a high quality signal of the Monticello station, a signal consistent in quality with the one he heard on May 15, 1995. (See Turro C 472)

Mr. Loginow also determined that the Fort Lee translator was able to receive the Monticello station directly off the air (Turro PF 126), another crucial determination ignored by the Bureau in its Proposed Findings.

Still another important part of the record ignored by the Bureau was Mr. Loginow's investigation on June 4, 1997. On that day, Mr. Loginow reproduced his May 15, 1995 tests with a signal generator and determined that the Fort Lee translator was receiving the signal of the Pomona translator off the air and retransmitting it. Unlike May 15, 1995, on June 4, 1997 Mr. Loginow conducted his signal generator tests out on the roof of the Mediterranean Towers (not enclosed in a room) and the antenna actually receiving the Pomona translator also was out on that roof. (Turro PF 135-139)

In its Proposed Findings 105-108, the Bureau makes an attempt to use the purported "deception" testified to by Mr. Luna and Mr. Gaghan, again mischaracterizing the actual record

and overlooking the fact that Universal, the employer of Mr. Luna and Mr. Gaghan, expressly declined to rely on their testimony. (Universal Proposed Finding 50, note 19) We will not repeat here the numerous failings, inconsistencies, proven bias, lack of foundation, and substantial credibility problems which are apparent for both of these witnesses. (See Turro PF 285-378; C 501-537) However, we are forced to address one matter raised by the Bureau.

In its Proposed Finding 105, the Bureau contends:

During Loginow's April 1995, inspections, Blabey informed Jay Epstein, then Jukebox Radio's general manager, that a Commission inspector was at the Monticello studio. Tr. 1138. Epstein gathered Luna, Gaghan and Bill Owen together in the Jukebox Radio studio. Turro Ex. 24, p. 4.

This Proposed Finding should be dismissed summarily and the Bureau found to have abused the Commission's processes for offering it because the Bureau relies on T24, p. 4, a one page statement of Mr. Epstein, about which the Bureau expressly represented during discovery:

Jay Epstein was the general manager of Jukebox Radio, Inc., from January, 1995, until August 1996. He supplied the Bureau with a signed statement. The Bureau does not intend to use this statement or to call Mr. Epstein as a witness in any portion of the Proceeding for any purpose. (T24, p. 2)

By now relying on Mr. Epstein's statement, the Bureau obviously has committed a misrepresentation. Similar to its misuse of the judicial processes in its Proposed Findings in connection with the Franklin Lakes station (see footnote 2, supra.), the Bureau should be found to have caused unnecessary and unreasonable burden to the judicial process and to Mr. Turro by failing to adhere to its written representation concerning Mr. Epstein's statement.

On the alleged "merits" of Mr. Epstein's statement, the Bureau has mischaracterized what little it appears to say. Mr. Epstein does not say that he "gathered" Mr. Luna, Mr. Gaghan, Mr. Owen, or anyone else, in the Jukebox Radio studio. Nor does it discuss an inspection of the

Monticello station. On the contrary, it seems to recount some memory held by Mr. Epstein of Mr. Loginow's visit to *the Dumont studio*. Mr. Epstein's statement seems to go to Mr. Loginow's inspection while visiting in Dumont, which would be another view of matters quite different from what Mr. Luna and Mr. Gaghan claim to remember. In any event, because the Bureau expressly represented that it would not call Mr. Epstein as a witness or rely on his statement, we did not consider deposing him, and so the parties and the record have been denied any reasonable discovery of Mr. Epstein's knowledge, if any.

The full record places the matter beyond reasonable dispute. Mr. Turro was able to and did operate the Fort Lee translator and WMG-499 in compliance with the Rules at issue and provide high quality Jukebox Radio signals by off the air retransmission. Mr. Loginow actually determined such compliance on April 14, 1995, on August 2, 1995 and again on June 4, 1997, days both before and after the May 15, 1995 incident. And the record establishes at least by a preponderance that at all times the Fort Lee translator was able to receive the signal of the Monticello station directly off the air. Therefore, fundamentally, the Bureau and Universal have been utterly unable to establish any incentive for Mr. Turro to seek to violate the Commission's Rules (and then lack candor or misrepresent the facts concerning them) when at all times he maintained the ability to operate the stations in full compliance. (Turro C 460) The FCC's own field engineer determined that the stations were operating in compliance on three different occasions. It must be found that the stations operated in compliance with the Commission's Rules.⁷

⁷In its Proposed Finding 6, Universal contends that Mr. Turro was "on notice" that the Commission was looking into the operations of Jukebox Radio as early as April 1995, and

III CANDOR AND MISREPRESENTATION

A WMG-499

As demonstrated in the preceding sections, from the time that Mr. Turro applied for what became WMG-499, through the time it was deactivated, Mr. Turro candidly provided all required information about that station, answered all inquiries about it candidly, and reasonably adhered to the Commission license granted for it. Therefore, there are no instances of lack of candor, or misrepresentation of facts, to the Commission in connection with WMG-499 and its operations. (See Turro PF 386-395) The contrary findings sought by the Bureau and Universal, based upon their misunderstandings of the Fort Lee translator failsafe programming, Mr. Loginow's May 15,

therefore, his conduct before July 1995 should be the only evidence assessed. This unsupported contention is without merit. Certainly, the HDO does not limit the time of scrutiny. There is no evidence in the record that the laws of physics, including radio wave propagation, materially changed between April and July, 1995, and therefore the substantial evidence from July 1995, and after, that Mr. Turro could, and did, have the Fort Lee translator receive Jukebox Radio off the air is entirely relevant. Such evidence includes Mr. Hurst's independent observations on July 6, 1995 and Mr. Loginow's investigations on August 2, 1995 and June 4, 1997. While there is no doubt that Universal wishes that the Judge would discard this overwhelming exculpatory evidence, there is no basis to do so. Finally, Jules Cohen, an expert witness of the Bureau and Universal, provided a wholly theoretical study intended to show that reception of the Monticello station off the air at the Fort Lee translator is statistically "unlikely." (See Turro PF 212-213; 218; 224) Mr. Cohen did not limit the validity of his study to a period of time prior to July 1995, nor did he challenge the accuracy or validity of rebuttal testimony to it from testing or observations undertaken during or after July 1995. (See Turro PF 223-226; 234-237) Indeed, Mr. Cohen admitted that actual experience might show that the strength of the Monticello station signal at the Fort Lee translator was higher than what he predicted as a theoretical matter (Turro PF 231) and that "it seems that there are circumstances which we really don't understand." (Turro PF 232) Mr. Cohen also testified that it would take extended observations to confirm the hot spot on the roof of the Mediterranean Towers. (Turro PF 211) Part of the importance of the evidence which Universal seeks to exclude is that it offers exactly the long term observations considered necessary by Mr. Cohen to confirm the hot spot. It is apparent that Mr. Cohen considered post-July 1995 experience to be valid and that such observations might help explain the "circumstances" which were not understood. Accordingly, Universal's attempt to sidestep exculpatory evidence must be rejected.

1995 testing, and otherwise, must be disregarded as contrary to the record.

We ask the Presiding Judge to note that, despite the Bureau's current misreading of the record, Mr. Turro offered extensive information about Jukebox Radio, WMG-499, and his arrangement with MMBI, as part of his July 27, 1995 response to the Bureau's letter of inquiry. Such information included, among other matters, copies of the agreements between Jukebox Radio and MMBI, complete answers to the questions posed by the Bureau, and a thorough engineering statement from Mr. Hurst.

The Bureau attempts to create an impression that Mr. Turro lacked candor with Mr. Loginow during the August 2, 1995 investigation. Such an impression would be wholly false.

In its Proposed Finding 42, the Bureau agrees that on August 2, 1995, Mr. Turro indicated to Mr. Loginow that he knew of Mr. Loginow's May 15, 1995 "jamming" of the Fort Lee translator (knowledge which clearly supports Mr. Turro's explanation of what occurred that day). The Bureau contends, however, that Mr. Turro "never mentioned or offered to show Loginow any equipment located in the basement of the Fort Lee facility. Tr. 503"

The Bureau is wrong. In his direct case, Mr. Turro testified:

I showed Mr. Loginow all of the equipment and facilities of the Fort Lee translator, including the antennas mounted on the roof of the Mediterranean Towers and the equipment on the 24th floor of the building. I explained to Mr. Loginow that the roof mounted antennas had been vandalized repeatedly over time and that I had used other receive antennas located elsewhere in the building. I offered to show him those antennas but he said that he was only interested in seeing the antennas in use that day. (T1, p. 25)

Contrary to the Bureau's view of the record, Mr. Loginow did not testify that Mr. Turro "never mentioned or offered to show Loginow any equipment located in the basement of the Fort Lee facility." The testimony cited by the Bureau at TR 503 was:

Q Was there any other conversation with respect to 5/15 events, the May 15 events, between you and Mr. Turro?

A No, nothing else.

Q Did he suggest or did he mention that on that date, the receive equipment for the translator was in the basement?

A No, he did not.

This testimony is far different from what the Bureau suggests. Mr. Turro would have had to have been clairvoyant to know that on May 15, 1995 Mr. Loginow went to a locked room at the Mediterranean Towers roof to test the receive characteristics of an antenna 26 stories below in the basement and that such a choice of procedure would become a hearing issue more than two years later. The undisputed record is that: (1) on August 2, 1995, Mr. Turro offered to show Mr. Loginow the "other receive antennas located elsewhere in the building" and that Mr. Loginow declined that offer (T1, p. 25), (2) the Bureau itself admits, and Mr. Loginow has testified, that Mr. Turro cooperated fully with Mr. Loginow during his investigations on August 2, 1995 (T27, p. 3; TR 387), and (3) despite any unfounded implications, Mr. Loginow inspected as he saw fit. (TR 387) Therefore, the undisputed record establishes that Mr. Turro made a reasonable (or greater) effort to show Mr. Loginow the basement antenna.⁸

The Bureau also mischaracterizes the record on this point by suggesting that Mr. Turro merely "testified" that "he was cooperative with Mr. Loginow." (Bureau Proposed Finding 42)

⁸In connection with candor and cooperation, the unchallenged record is that on August 2, 1995, after Mr. Loginow concluded his investigations of the Fort Lee translator, Mr. Turro affirmatively invited Mr. Loginow to examine the Pomona translator, and then drove Mr. Loginow there personally. (Turro PF 128) Such actions conclusively demonstrate Mr. Turro's abundant efforts to cooperate with Mr. Loginow and assist him in performing as thorough an investigation as possible.

This is false. The Bureau *admitted* that Mr. Turro cooperated fully with Mr. Loginow. (T27, p. 3) Mr. Loginow also testified that Mr. Turro cooperated fully. (TR 387) Having admitted that Mr. Turro cooperated fully, and having left unchallenged Mr. Turro's testimony that he offered to show Mr. Loginow other receive antennas around the building, the Bureau has no record support from which to suggest that Mr. Turro materially failed to show Mr. Loginow the Mediterranean Towers basement antenna during Mr. Loginow's August 2, 1995 investigations. Based upon its own admission, the Bureau should be foreclosed from seeking a finding that Mr. Turro did anything other than cooperate with Mr. Loginow during his August 2, 1995 investigations.

B The 1991 Declaratory Ruling

As the record shows, by letter dated January 30, 1991 Mr. Turro sought an advance declaratory ruling concerning a programming relationship between an FM translator licensee and the licensee of its rebroadcast primary station (MMB1, p. 6), and by letter November 19, 1991, the Chief of the Mass Media Bureau provided Mr. Turro with a declaratory ruling on that subject. (MMB1, pp. 8-9) The letters speak for themselves.

The Bureau and Universal have sought sweeping findings as to Mr. Turro's candor in connection with that declaratory ruling, including shockingly bold findings that Mr. Turro committed perjury. (See Bureau Proposed Findings 95-99; Universal Proposed Findings 52-55) Those findings are patently absurd.

For example, in its Proposed Finding 97 in connection with the declaration sought in 1991, the Bureau contends that:

Turro testified that he understood "time brokerage" to involve the purchase of discrete

blocks of time, which involved only a few hours a day over the brokered station, as opposed to a local marketing agreement (where one takes over a station's operations) or a network affiliation agreement (where a station can take as much programming as it wants.) Tr. 2034-39. Turro testified, however, that when he filed the 1991 request, he intended to provide 100 percent of the programming to the "originating" station. Tr. 2039-40.

Again, the Bureau fails to recognize the relevant record. Mr. Turro, a non-lawyer, expressly testified that he did not understand the differences between an LMA (local marketing agreement) and a time brokerage agreement (TR 2034) and that he relied on advice of counsel that the NAA was an accurate reflection of the 1991 declaratory ruling. (Turro PF 390) And while the Bureau suggests that Mr. Turro lacked candor in his 1991 request for declaration by not stating that he might broker all of the broadcast time of a station (Mr. Turro said he wanted to "purchase broadcast airtime" or "brokered airtime" (MMB1, p. 6)), the Bureau itself specifically acknowledges that: "...the rulings and policies for time brokerage have evolved to allow all or nearly all of a station's broadcast week to be brokered..." (MMB Proposed Findings, p. 89, note 19) Because the FCC's own Mass Media Bureau understands that "time brokerage" appropriately may comprehend all of a station's airtime, it is absurd to suggest that a non-expert such as Mr. Turro lacked candor by failing to clarify the term "brokerage" in the way the Bureau understood it.⁹

Mr. Turro expressly testified that he never tried to deceive the FCC in connection with his request for declaration and that he never tried to conceal important facts. (Turro PF 391) Also, the Commission itself has held that Mr. Turro's reliance on the declaratory ruling for

⁹It also is unreasonable to expect that in January 1991 Mr. Turro could know the exact scope of the agreement he eventually entered into in 1994 with MMBI.

entering into the agreement with MMBI was "not unreasonable," as follows.

We are at a loss as to why the Bureau and Universal raise any issue about the 1991 declaratory ruling sought by Mr. Turro and given to him by the Bureau. We submit that in the HDO, the Commission itself foreclosed action against Mr. Turro based upon that declaration:

...we acknowledge that the Bureau issued Turro a letter in 1991 which he may have construed to authorize his relationship with WJUX and MMBI. [citation omitted] We agree with the Bureau that the 1991 letter was not so broad as to authorize what is now known to be the relationship between WJUX and the translators. We find Turro's contention to the contrary, however, is not unreasonable. Accordingly, we will not pursue in this proceeding any violation of Section 74.1232(d) that may have resulted from Turro's reliance on the 1991 letter. (HDO, note 13) (See Turro PF 494-496)

In designating this proceeding, the Commission made it clear that it had reviewed the matter of the 1991 declaratory ruling and the relationship between Mr. Turro and MMBI which has been based upon it. Having so reviewed the matter, the Commission obviously was free to designate a candor (or any other) issue in the HDO based upon the 1991 declaration, if it determined that such an issue was warranted. The Commission did not. To the contrary, the Commission expressly elected not to designate an issue against Mr. Turro in connection with the 1991 declaratory ruling and, instead, held that Mr. Turro's reliance on that ruling was not unreasonable.

The Commission foreclosed this subject, and at no point did the Bureau or Universal take steps to seek reconsideration from the Commission on this matter or seek to enlarge issues to include it. Their tardy attempt now must be dismissed. The Presiding Judge should not be put into the position of attempting to overturn a Commission decision here.

In addition, the Bureau and Universal have no record evidence to support their claims. Mr. Turro testified that he was forthcoming to the Commission, the Commission itself agreed

with him, and the argument to the contrary is, at best, a quibble about the purported meaning of the term "brokerage." As noted above, the Bureau itself acknowledges that time brokerage may include all of a station's airtime, so Mr. Turro could not have been deceiving the Commission.

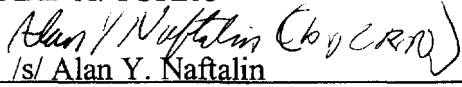
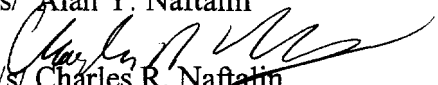
It is worth noting that Mr. Turro, in fact, wrote to the Commission and sought its declaration on the subject. As a general matter, the Presiding Judge should find that such an explicit attempt to obtain the Commission's views demonstrates an intention to be candid in and of itself. (Turro PF 494) After all, the Bureau was free at the time to deny his request for declaration or issue a different declaration. It would be fundamentally unfair to penalize Mr. Turro now for seeking advice from the Commission, obtaining it, and then relying upon that advice "not unreasonably."

IV CONCLUSION

Based upon the foregoing, and Mr. Turro's Proposed Findings of Fact and Conclusions, the Proposed Findings of the Bureau and Universal should be rejected in their entirety and, therefore, Mr. Turro's applications for the renewal of the licenses of the Fort Lee translator and the Pomona translator should be granted unconditionally for full license terms.

Respectfully submitted,

GERARD A. TURRO

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BUREAU MISCHARACTERIZATIONS OF THE RECORD

MMB Proposed findings

8. The Bureau contends: "From March 1986, until March 1993, the Fort Lee translator rebroadcast the signal of WPST, Trenton, New Jersey. Tr. 2055"

This mischaracterizes the record. Mr. Turro testified that when he first started operating the Fort Lee translator on March 13, 1986, he was rebroadcasting WPST. (TR 2055) He subsequently stated that WPST was rebroadcast for "a few years." (TR 2056) Mr. Turro simply did not testify that WPST was rebroadcast by the Fort Lee translator from March 1986 until March 1993.

9. "WNJW aired Turro's Jukebox Radio programming, which was delivered to the Fort Lee translator via Turro's Inter-city Relay ("ICR") station WMG-499. MMB Ex. 9"

This misstates the record. MMB9 consists of copies of Mr. Turro's application for a new aural microwave intercity relay station and the Commission's subsequent grant of a license for that station under the call sign WMG-499. At no place in that application, or the Commission's license for it, does it state that the station was to be used to deliver Jukebox Radio programming. On the contrary, the express, and only, statement of the purpose of the station authorized under call sign WMG-499 was provided by Mr. Turro's consulting engineers who prepared the application. We direct attention to our Reply for a complete description of the record.

The Bureau then digresses into a post-record, and irrelevant, discussion of the requested cancellation of the Franklin Lakes on January 30, 1998 (approximately six weeks after the hearing record was closed) and notes that the station was licensed to Bergen County Community Broadcast Foundation ("BCCBF").¹ The Bureau contends that "BCCBF is a non-profit entity controlled by Turro who is a founding member of its Board of Directors. MMB Ex. 22, Admissions 11 & 12."

The record does not support the Bureau's contention. MMB22 Admission 11 asked: "BCCBF is a non-profit entity" (MMB21, p. 382), which Mr. Turro admitted. (MMB22, p. 456) Admission 12 asked: "At the time it acquired WRRH(FM), BCCBF's Board of Directors consisted of Turro, Jean Swann, and Lee Martin, Jr. (MMB21, p. 382), to which Mr. Turro responded "Not relevant to this proceeding." (MMB22, p. 456)

¹The Bureau also fails to inform the Judge that the Franklin Lakes license was surrendered by Mr. Turro in response to a Commission direction.

The Presiding Judge denied the Bureau's request to compel a number of responses from Mr. Turro concerning the Franklin Lakes station on the grounds that matters related to it were irrelevant. Memorandum Opinion and Order, FCC 97M-121 (released July 11, 1997) Therefore, there is no evidence of record as to the circumstances of the Franklin Lakes station, its "directors," its "founding" members or "control" by Mr. Turro. By seeking proposed findings on matters both unproven and irrelevant, the Bureau flouts the Judge's ruling and overtly mischaracterizes what little record concerning the Franklin Lakes station which may have entered into the record inadvertently or tangentially.

10., footnote 2 The Bureau contends that: "The call sign for the station was changed from WXTM to WJUX April 14, 1995. MMB Ex. 22, Admission 83."

Mr. Turro's actual response to Admission 83 was "Unknown." (MMB22, p. 460)

11. The Bureau contends that: "FM 103, Inc., is a for profit entity formed by Turro in order to sell advertising on the Fort Lee translator. Tr. 2045-46"

At no point in TR 2045-2046 does Mr. Turro testify as to the formation of FM 103.1, Inc. (We assume that the Bureau intends to mean FM 103.1, Inc. when it refers to "FM 103, Inc.")

14. The Bureau contends that: "Upon receipt of the Bureau's letter [*i.e.* the November 19, 1991 declaratory ruling], Turro set out to find a primary station."

The record actually indicates that Mr. Turro "started looking for opportunities." (T1, p. 3; TR 1727)

15. The Bureau contends that: "In the summer of 1994, Larry Fishman ("Fishman"), permittee of a new FM station in Monticello, New York, contacted Turro about the possible sale of the construction permit. Turro Ex. 1, pp. 3-4."

This mischaracterizes the evidence. In T1, pp. 3-4, Mr. Turro testified that "sometime in 1994" (the summer is not mentioned, indeed, Mr. Turro stated that he could not remember exactly when) Mr. Fishman called him asked questions about how to start up a new FM station. Mr. Turro does not state there that Mr. Fishman called him about the possible sale of the construction permit.

17. The Bureau contends: "Under the Commission's Rules, Weis was required to divest his interest in the Pomona translator when it was used by Turro to rebroadcast the signal of WJUX. Tr. 1399-1400."

The Bureau mischaracterizes the record. Mr. Weis, a private citizen and non-lawyer, was cross-examined about his past interest in the Pomona translator at TR 1399-1400, but no legal conclusions as to any divestiture "requirements" are reached there, nor could such conclusions be

reached.

18. The Bureau contends (citing MMB2, p. 35): "Universal's complaint contained an engineering report claiming that the nature of WJUX's signal made it highly unlikely that it was being received over-the-air and rebroadcast on the Fort Lee translator."

The Bureau is wrong. At MMB2, p. 35, Universal stated to the Commission: "...it is clear from the Engineering Report that the high quality signal being originated by W276AQ rules out any possibility that the signal of WXTM is being rebroadcast either through direct off-air reception of that station or by relay of the WXTM signal by Translator Station W232AL, Pomona, New York." (footnote omitted, emphasis added)

The point here is that Universal and its consulting engineers represented to the Commission in 1995 that it was technically impossible for the Fort Lee translator to be in compliance with the Commission's Rules by receiving programming off the air. (See Turro PF 7-8) Those assertions lacked candor (see Turro C 538-542), and in any event, the record clearly does not support the Bureau's characterization that Universal's February 1995 complaint merely alleged that off the air reception was "unlikely."

In proposing findings concerning the February 15, 1995 Universal complaint's discussion of the 1991 declaratory ruling, the Bureau contends: "Universal alleged that while Turro described the proposed operation as one in which the primary station would support the translator, Turro, in fact, intended to have the translator support the primary broadcast station."

Although the Bureau provides no citation to the record in this portion of its proposed findings, a reading of the request for ruling (MMB1, p. 6), the declaratory ruling itself (MMB1, pp. 8-9) and the Universal complaint (MMB2, p. 36) establishes that the Bureau has misstated the record drastically in this portion of its proposed findings.

20. In characterizing Mr. Turro's response to Mr. Goldstein's June 21, 1995 letter of inquiry, the Bureau contends:

In response, Turro asserted that the programming produced in his Dumont studio was delivered via telephone to WJUX, which rebroadcast it pursuant to a network affiliation agreement between Turro and MMBI. The WJUX signal was then received off-air at the Pomona translator. The WJUX signal was then received by the Fort Lee translator from the Pomona translator.

The Bureau fails to note that in the exact same response, Mr. Turro explained and established that the Fort Lee translator was able to receive the signal of the Monticello station (*i.e.* WJUX) directly off the air, that Mr. Hurst supplied a sworn engineering statement to that effect, and that Mr. Turro provided an audio tape of Jukebox Radio programming transmitted by the Fort Lee translator demonstrating the quality of its signal when receiving either of the

Pomona translator or the Monticello station off the air. (MMB8, p. 115; pp. 126-131)

24. The Bureau contends: "Turro stated that, in addition to originating the 30-second translator support messages, he also intended to use the ICR to provide telemetry (*i.e.*, remote control) for operation of the Fort Lee translator from the Jukebox Radio's studio. Tr. 1805-06"

The "in addition to" reference is misleading. In the original application for the station which the Commission granted under the call sign WMG-499, Mr. Turro expressly represented that it would be used for "operational communications" from the Dumont studio to the Fort Lee translator. (MMB9, p. 151) The Bureau's reference to TR 1805-06 is, at best, cumulative of Mr. Turro's initial representation to the Commission that operational communications would be carried on WMG-499. After all, operational communications are synonymous with telemetry or remote control, as the Rule makes clear:

Operational communications include cues, orders, and other communications directly related to the operation of the broadcast station as well as special signals used for telemetry or control of apparatus used in conjunction with broadcast operations.
(74.531(f))

25. The Bureau contends: "On November 30, 1994, after WNJW ceased broadcast operations, Turro notified the Commission that the Fort Lee translator had changed its associated primary station from WNJW to WJUX. That letter did not identify or discuss the use of the ICR in connection with the Fort Lee translator's rebroadcasting of WJUX. MMB Ex. 2, p. 46."

This proposed finding assumes facts not in evidence, namely, that the use of WMG-499 changed in any material way as a consequence of the Fort Lee translator rebroadcasting the Monticello station and it seems to assume some obligation on the part of Mr. Turro to provide notification to the Commission of such changes, even if they occurred.

27. The Bureau contends that: "When the data path was operational and providing telemetry to the Fort Lee translator, the ICR-delivered audio microwave path was terminated into a "dummy load" to prevent damage to the ICR. Tr. 1626"

While this characterization of evidence may not be entirely inaccurate, the citation to TR 1626 does not support the proposed finding.

"If for any reason, telemetry along the microwave path was lost, the ICR-delivered microwave audio path from Dumont containing Jukebox Radio programming would shift automatically from the dummy load to the Fort Lee translator for direct broadcast by the Fort Lee translator. Turro Ex. 1, p. 23, Tr. 1626, 1631, 1634-35, 1637-38, 1652, 1681-82."

This proposed finding by the Bureau relies upon a very substantial confusion of the record from both the Bureau and Universal. Because of the degree of confusion, and its

significance to the facts, it is addressed it depth in Mr. Turro's Reply, and we direct attention to the copious record references there.

31. The Bureau relies on TR 348 to contend that Mr. Loginow drove to the Mediterranean Towers on May 15, 1995 "without any prior warning either to WJUX or Jukebox Radio personnel." However, that part of Mr. Loginow's testimony makes no mention of warnings. The Bureau also contends that: "This test involved generating a signal on the signal generator on a frequency that would override another weaker or more distant signal on the same frequency. MMB Ex. 4, p. 84; MMB Ex. 16, p. 250-51." Neither of those citations mentions the subject of overriding "another weaker or distant signal."

32. The Bureau contends: "The signal generator used had, effectively, a maximum power of less than ½ watt, which Loginow described as a "low level" signal. Tr 532." This citation is incorrect. The Bureau contends that: "Loginow listened to the impact of the signal generator on the various frequencies tested on a Sony car radio. Tr. 356." This citation is erroneous. The record does not show that Mr. Loginow used a Sony car radio, but instead, a Sony radio "that people run around in" (*i.e.* a "walkman" or something like it).

34. The Bureau contends that Mr. Luna and Mr. Gaghan "...maintain that during their employment from February 1993, to May 1995, the Fort Lee translator directly received the Jukebox Radio programming from Dumont via the ICR-delivered microwave signal most of the time. MMB Ex. 14, pp. 230-231; MMB Ex. 15, 241; Tr. 240-42; 735, 738."

This Bureau Proposed Finding mischaracterizes the record and relies upon erroneous citations. Mr. Luna testified: "At this time, it was my understanding that the Jukebox Radio audio signal was routinely transmitted directly from the Dumont, New Jersey, studio of Jukebox Radio to the Fort Lee translator via a microwave link..." (MMB14, pp. 229-230) Mr. Luna also testified: "Accordingly, we usually used the microwave link..." (MMB14, p. 231) Mr. Luna did not directly state that such purported use of "the microwave link" was "from February 1993, to May 1995." Nor is the testimony properly cited to MMB14 pp. 230-231. Similarly, Mr. Gaghan testified: "It was my understanding that the Jukebox Radio audio signal was usually transmitted directly from the Dumont, New Jersey, studio of Jukebox Radio to the Fort Lee translator station via a microwave link..." (MMB15, p. 240) Mr. Gaghan did not directly state that such an alleged arrangement took place from February 1993 to May 1995. Considering that he also testified that he came to Jukebox Radio on March 1, 1993, he could not have so testified. Also, Mr. Gaghan's testimony is not properly cited to MMB15, p. 241. The TR citations also are erroneous. TR 240-242 would be pages preceding live hearing testimony. TR 735 and 738 do not support the Bureau's point.

38. The Bureau contended that: "Turro testified that any calls to Luna and Gaghan from listeners who claimed they could not hear WJUX, Monticello, are easily explained by the fact that the Monticello station has, at times, operated at reduced power, or that its signal is temporarily lost due to weather conditions that can affect some receivers within WJUX's primary service contour.

Turro Ex. 1, p. 21.”

Mr. Turro actually testified:

The Monticello station has operated at reduced power on more than one occasion. I have described the time in April of 1995. At other times, ice has built up on the antenna causing an overload in the Energy Onix transmitter. Under those conditions, the transmitter would reduce power but not shut down. As noted earlier, the Pomona translator is able to receive a satisfactory signal from the Monticello station at reduced and rebroadcast when many other receivers would not be able to receive a signal. At other times, weather conditions, such as temperature inversion, can cause temporary loss of reception of the Monticello station by some receivers. (T1, p. 21)

In addition, the Bureau failed to note the testing of reduced Monticello station power. to Mr. Hurst testified that he conducted tests establishing that the Pomona translator was able to receive the Monticello station even at power levels below 100 watts. (T2, pp. 4-5) The Bureau simply did not deal with this evidence, and by failing to do so, mischaracterized the record.

52. The Bureau contends that: “Although Turro and his consulting engineer denied in the LOI [letter of inquiry] that WJUX’s over-the-air signal was not being received (either directly, or later via the Pomona translator) at the Fort Lee translator, they did not discuss with any specificity how the Fort Lee translator was configured or operated — and the full role that the ICR played in that configuration, in the July 1995 response to the LOI. MMB Ex. 8, pp. 114-18.”

While the Bureau’s assertions here are less than clear, we point out the following. As the record makes clear, WMG-499 had been deactivated weeks before Mr. Turro filed his response. Within that response, Mr. Turro discussed WMG-499 extensively (MMB8, pp. 114-116) and Attachment A to the response included copies of the June 1995 correspondence between the Commission and Mr. Turro’s consulting engineers on the subject of WMG-499, providing even more detailed information. (MMB8, pp. 124) As made clear in our Reply, the operations of WMG-499 had never materially changed. The “configuration and operation” of the Fort Lee translator was addressed fully and extensively in the response, both by Mr. Turro (MMB8, pp. 114-118) and by Mr. Hurst (MMB8, pp. 126-131).

58. The Bureau contends that: “At that time the [sic] NAA was signed, Jukebox Radio was a financially struggling operation and did not have the cash on hand to make this initial payment. Tr. 1832-33”

The Bureau mischaracterizes this testimony. Mr. Turro testified that at the time he entered into the NAA he “had money on hand,” although he may have taken out a loan too. (TR 1833) The Bureau did not establish in the record that, categorically, taking out a loan necessarily equates to “financially struggling.” In fact, Mr. Turro attempted to clarify matters to Bureau counsel:

When I was talking about financial limitations, I was talking about financial limitations due to this hearing and the costs it's put on me. That's what I was referring to." (TR 1833)

64. In its Proposed Finding 64, the Bureau flatly contends that in 1996 MMBI increased the network compensation owed by Jukebox Radio by \$1,000 per month.

The Bureau fails to recognize the record. Mr. Turro corrected the record to establish that the increase in network compensation was only about \$100 per month, not \$1,000. (TR 2100)

104. The Bureau mischaracterizes the record to contend that there was some discrepancy between the testimony of Sergeant Einreinhofer of the Bergen County Office of Emergency Management and Mr. Turro about the placement of emergency warning messages on the Fort Lee translator. Sergeant Einreinhofer testified as to the cooperative arrangement by which Jukebox Radio would place emergency messages on the air at the request of the Bergen County Office of Emergency Management. (T3, p. 2) In the testimony relied upon the Bureau, Sergeant Einreinhofer testified that his office requested that Jukebox Radio air official information for the public, including emergency information. (TR 1327-1329) The Bureau tries to raise an artificial claim because the Bergen County Office of Emergency Management did not "require" that Jukebox Radio interrupt its regular programming to provide emergency messages.

The Bureau has no record support the proposition that state or local governmental entities ever "require" interruption of regular broadcast programming for the dissemination of official information, or that theoretically such interruptions make any difference in the nature or character of emergency messages. Certainly, the Section 74.1231(g) of the Commission's Rules does not require that emergency messages "interrupt" regular programming. The undisputed record is that the Bergen County Office of Emergency Management and Jukebox Radio have had an agreement by which Jukebox Radio would air messages at the request of the Bergen County Office of Emergency Management, and that Jukebox Radio did so. The Bureau's contention here is irrelevant to those facts.

104. In its Proposed Finding 104, the Bureau erroneously attempt to minimize the effect of Mr. Owen's testimony that the purported "deception" alleged by Mr. Luna and Mr. Gaghan simply did not happen, even though Mr. Luna and Mr. Gaghan claimed that Mr. Owen was part of it. The Bureau's record references here are inaccurate or incomplete.

For example, at TR 1239 (a page cited by the Bureau in its Proposed Finding 104) and carrying onto TR 1240, Mr. Owen actually testified:

JUDGE STEINBERG: Do you recall at any time during your work there you being next to a button and somebody counting down three, two, one, and when you hit one -- when they hit the number one, the person speaking, you would push a button in?

THE WITNESS: No, I don't remember anything like that.

JUDGE STEINBERG: Do you think you would have if that happened?

THE WITNESS: I would remember something like that, I would assume.

JUDGE STEINBERG: Would that be extremely unusual, an extremely unusual request of you from anybody at Jukebox Radio?

THE WITNESS: Highly unusual. Doing the show the way I did, I was -- I was very, very busy operating the board with the music, and if anybody would take me away from it, I think I would be very aware of.

JUDGE STEINBERG: Now, you have on page 2, you said, "I have no memory of the incident."

Could it have happened but you just flat out don't remember it?

THE WITNESS: I know it didn't happen while I was there. Nothing like that, nothing even resembling that.

JUDGE STEINBERG: In which you were a participant?

THE WITNESS: Right.

110. The Bureau mischaracterizes the testimony by claiming that: "Kirschner is a trusted friend of Turro and is familiar with the Jukebox Radio operation. Tr. 1967-71."

During cross-examination, Mr. Turro identified three different engineers who were "friends" of his who he could call in the event that a technical problem cropped up at Jukebox Radio during one of Mr. Turro's rare absences. The other two gentlemen were named Nick Doshi and Steve Pepe. Mr. Turro never referred to any of them as "a trusted friend," but just as local radio engineers who would do him a casual professional favor, just as he would do for them, if need be. (TR 1967-1971)

111. The Bureau contends that: "There was nothing in Turro's response [to the letter of inquiry] to suggest that Jukebox Radio was providing 100 percent of WJUX's programming and advertising. Moreover, although the NAA, Turro's Personal Guarantee and the Amended NAA were attached to Turro's response, there was no reference to or discussion of the significance of the monthly "network payments" made to MMBI. MMB Ex. 8, pp. 114-118."

This Bureau proposed finding is contrary to the record. A copy of the NAA was given to Mr. Loginow on April 13, 1995 (see MMB4, pp. 85-86) and again was filed with the Commission as Attachment D to Mr. Turro's July 27, 1995 response. (MMB8, pp. 137-138) The NAA states specifically: "Network will provide MMBI with twenty-four hours of programming on a seven day basis, 365 days a year. Network will also provide all local station identifications (Legal ID's), public affairs programming, and Emergency Broadcast System Tests.") (MMB4, p. 85; MMB8, p. 137) The Bureau's suggestion is absurd that it was not provided with full disclosure as to the programming arrangement between Mr. Turro and MMBI, or not informed as to the purported "significance" of the payments made, which also were expressly set out in the NAA. (Ibid.)